

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL **77-2123**

To be argued by
ARTHUR WEINSTEIN

United States Court of Appeals

For the Second Circuit

BERNARD BERGMAN,
Petitioner-Appellant,
against

Honorable LOUIS J. LEFKOWITZ, New York State Attorney
General, the JUSTICES OF THE SUPREME COURT OF THE STATE
of New York, sitting in New York County,

Respondents-Appellees.

On Appeal from the United States District Court
For the Southern District of New York

APPELLEES' BRIEF

CHARLES J. HYNES
Deputy Attorney General
State of New York
Attorney for Respondents-Appellees
270 Broadway
New York, New York 10007
(212) 488-2600

EDWARD J. KURIANSKY
ALAIN M. BOURGEOIS
ARTHUR WEINSTEIN
Special Assistant Attorneys General
Of Counsel



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APPELLEES' BRIEF

Statement of the Issues

1. Whether a prosecutor who agrees to recommend a specific sentence, and does so, must, under the Constitution, also comply with the precise and literal terms of the agreement even where to do so would be evident to the sentencing judge as "rank hypocrisy."

2. Whether a prosecutor's public expression of disappointment in a sentence which he may be bound, by a

plea agreement, to recommend that another judge not exceed, violates the Constitution even where there was no express or implied promise not to make a public statement and no effect on the sentencing judge was intended or shown.

3. Whether the action of defense counsel, in thanking a prosecutor for complying with his promise to make a sentence recommendation, as part of a strategic decision by the defendant and his counsel not to risk the benefits of a brief companion sentence, constitutes a waiver of any objection to the prosecutor's compliance.

4. Whether a petitioner's failure to pursue any of the prescribed remedies for an alleged breach of an agreement to recommend a specific sentence entitles him to the even greater relief of not having to serve any sentence.

5. Whether a petitioner's failure to fairly raise question (2) in any state court proceeding precludes relief in the federal courts.

Statement of the Case

This is an appeal from an order of the United States District Court for the Southern District of New York (GOETTEL, J.), entered October 4, 1977, denying petitioner Bernard Bergman's application for a writ of habeas corpus. The writ challenged the validity of a one-year sentence of imprisonment imposed by the Supreme Court of the State of New York, New York County (MELIA, J.) upon a judg-

ment convicting petitioner, upon his plea of guilty, of the crime of offering unlawful fees and payments to a member of the State legislature.

Petitioner sought the writ on the grounds that the sentence was, in several respects, in violation of a plea agreement with the New York State Special Prosecutor for Nursing Homes, Health and Social Services, under which the prosecutor promised, *inter alia*, to recommend to the state sentencing judge that Bergman not receive any sentence in addition to that imposed upon him by the United States District Court on a federal indictment (to which Bergman also pled guilty as part of a tripartite plea agreement with the respective prosecutors). Petitioner also alleged that the state judge had promised to follow the recommendation. Petitioner further contended that the action of the Special State Prosecutor in publicly expressing his disappointment with the "insubstantial" federal sentence, even if it did not violate the plea agreement, constituted an independent act of prosecutorial misconduct entitling petitioner to avoid service of his sentence. Finally, petitioner contended that service of a state sentence violated his right against double jeopardy.

The District Court found, as fact, that petitioner had never been promised what his state sentence would be, or that it would be imposed on the same day as the District Court sentence, or that the Special Prosecutor would not criticize the Federal sentence. It further found as fact that the petitioner's hope that the prosecutor's factual submission to the sentencing judge would reflect a minor role in the nursing home industry was abandoned when petitioner denied access to books and records which showed the complete extent of his holdings. The Court held that the pros-

ecutor's in-court recommendation of no additional sentence, while "tepid" and not in literal compliance with the written agreement, was effective when measured by "all the circumstances involved in the sentencing proceeding" and that any attempt at a more "glowing endorsement" would, under those circumstances, have been evident as "rank hypocrisy." The Court also held that the prosecutor had a right to oppose petitioner's motion for resentencing in the state court.

The Court also held that even if there was a violation of the plea bargain, petitioner's failure to object was a "carefully calculated course selected by skilled counsel * * * to keep the benefits of the bargain already received (the brief federal sentence), thereby accepting whatever breaches may have occurred."

The Court further held that the Special Prosecutor's public criticism of the sentence imposed by the District Court was "unwarranted and improper," but denied the writ because the petitioner "failed to show that it was unconstitutionally prejudicial to a fair sentencing."

The Court declined to reach the double jeopardy argument because petitioner had failed to raise it in any state proceeding.

Statement of Facts

Bergman Is Indicted by State and Federal Grand Juries in Multi-Million Dollar Medicaid Frauds.

During 1973 and 1974, the New York Temporary State Commission on Living Costs and the Economy, chaired by Assemblyman Andrew Stein, initiated an investigation into the nursing home industry (Stein: 525-26). Widespread

allegations of criminal fraud, bribery of public officials and inhumane living conditions in these homes led to the creation of an Office of Special State Prosecutor under Deputy Attorney General Charles J. Hynes (Hynes: 55; Stein: 526-27). One of the principal subjects of his investigation was the petitioner, Bernard Bergman, who had accumulated at least \$24 million as the head of what the State Probation Department was to call a "nursing home empire" involving interests in perhaps fifty facilities (Probation Report at 9-12). A "parallel and somewhat overlapping" federal investigation was undertaken and indictments were returned in both jurisdictions on August 5, 1975. A. 4.*

The first count of the eleven-count federal indictment charged Bergman and his son Stanley with conspiring to defraud the United States by obtaining payment of false, fictitious and fraudulent claims for Medicaid reimbursement totaling over \$1.5 million, by concealing partnership interests in the Towers Nursing Home, and by submitting false reports of expenditures. The Bergmans were also indicted on three counts of filing false tax returns, three counts of submitting false claims—totaling almost two million dollars, and four counts involving fraudulent reporting. 75 Cr. 785.

The initial count in the ten-count New York State indictment charged Bergman, his son, and their accountant with conspiring to violate a section of the State Public Health Law relating to health and sanitary conditions in nursing homes, conspiring to file false claims for reimbursement, and conspiring to commit larceny. It was

* The prefix "A." connotes pages of the appendix.

alleged that they established and used a dummy corporation as a vehicle and conduit for the payment of monies to Bergman's secret partners in the Towers, that the three falsely claimed more than \$3 million as legitimate reimbursable patient care expenses, and that they thereby stole over one million dollars from the State and its political subdivisions. The nine other counts of the state indictment involved the filing of various fraudulent annual reimbursement claims in which expenses were inflated by between \$600,000 and \$900,000 (including such items as \$100,000 in salaries to Bernard Bergman's wife, for which she performed no services, and \$422,000 in payments to the dummy corporation), the resultant larcenies and attempted larceny of over one million dollars, and the obstruction of governmental administration through the concealment of subpoenaed documents. Indictment 3741/1975.

A Plea Bargain Is Struck Under Which Bergman Is to Plead Guilty to a Different State Charge and Make Full Restitution in Return for a Recommendation that No State Sentence Be Added to the Federal.

Plea negotiations were begun between the two prosecutors' offices and Bergman's lawyers, including Nathan Lewin (Lewin: 342-43). The United States Attorney's Office was prepared to accept a plea of guilty to the first and third counts of the indictment, together with an admission of guilt. A. 61-62 (¶¶1, 3). But because both indictments involved, in some part, the financial operation of the Towers Nursing Home and the submission of the same fraudulent claims for reimbursement through state and federal funding, it was uncertain whether, under New York law, a judgment of conviction could then be rendered on the state

indictment even though the offenses were separate for purposes of double jeopardy (Lewin: 350). Bergman agreed to plead guilty instead to a projected indictment charging him with a violation of section 77 of the Public Officers Law, a felony involving offering unlawful fees and payments to members of the legislature. Bergman waived immunity and admitted before a state grand jury that he had agreed to hire a consulting firm in which State Assemblyman Albert Blumenthal had a financial interest in return for Blumenthal's intervention with the Department of Health, which had been delaying operating approval for another of Bergman's nursing homes, the Park Crescent, because of the "atrocious" sanitary conditions it found at the Towers (Bergman grand jury testimony of Mar. 10, 1976 at 6-11; respondents' exh. 10, exhs. 8-12 thereto). In return, all other state charges against Bergman and his son would be dismissed. A. 57-58 (¶¶1, 3).

Bergman also promised to pay to the State, voluntarily and without litigation of any kind, whatever money was owed to the State as the result of Medicaid overpayments to any of his nursing homes. The amount was to be determined after examination of Bergman's financial and business records. A. 59 (¶8). No timetable was specified, but Justice Melia was assured, by both sides, that "all would be well. It would be determined and taken care of long before [sentencing]." Petitioner's exh. 4 at 67. The District Court, having heard essentially contradictory testimony from the former assistant chief prosecutor (Wilson: 1368, 1392-99) and Bergman's attorney (Lewin: 365-66), found as fact that, "While complete payment probably was not contemplated prior to sentencing, it does appear that Bergman was expected either to agree on amount or to

make good faith efforts to reconcile the disparity in claimed amounts." A. 22-23.

Bergman and his family agreed to be "forthright, honest and completely truthful" with both prosecutors and the prosecutors could declare the plea agreement "null and void" if they found the Bergmans to be otherwise. A. 58-59 (¶¶5-6), A. 62 (¶5). The District Court found that Bergman's compliance with all aspects of the agreement—including restitution—was the "obvious *quid pro quo* of the prosecutor's performance." A. 22.

The United States Attorney agreed to adhere to his usual practice as to sentence: he would make no recommendation, but would apprise the court and the probation department as to the results of his investigation and the scope of Bergman's cooperation. A. 63 (¶8).

Bergman wanted to be guaranteed that he would not be given an additional sentence by the state court. Bergman's attorneys, Lewin and Gustave Newman, and Chief Assistant State Prosecutor Howard Wilson approached State Supreme Court Justice Harold Birns with this proposal; but Justice Birns refused to make any promise as to what sentence he would impose (Lewin: 359; Wilson: 845-46). When Justice Birns was elevated to Appellate Division, the case was assigned to Acting Supreme Court Justice Aloysius Melia (Melia: 1040). Justice Melia also steadfastly refused to "buy a pig in a poke" by binding himself to a federal sentence with which, he told the lawyers, he might prove to "be happy or unhappy" (Melia: 1050-51, 1054-55). The Special Prosecutor then agreed that, in light of Bergman's

having voluntarily disclosed the facts of the unlawful payment and of the District Court Judge's awareness of those facts, he would recommend to Justice Melia that no additional state sentence be imposed. A. 58 (¶4). Justice Melia told the lawyers that their agreement was permissible, but that it did not bind him (Melia: 1054).

The state sentence was to be imposed after the federal sentence was imposed and, if possible, after Bergman's testimony was no longer required. A. 59 at ¶9. Sentencing on the same day was, as the District Court below found as fact, "an aim and not a promise." A. 47 at n. 25 (*but see* A. 9). Although the Special Prosecutor would not recommend a specific sentence in the federal court, he would submit a factual summary of the evidence acquired during the course of his investigation into Bergman's activities. A. 79.

There was also, the District Court found, an agreement barring press statements following the plea, but "no agreement, explicit or otherwise, about press statements after sentencing." A. 6, 24. Restrictions on what the prosecutor could say "were limited to in-court declarations." A. 6.

**Bergman, Knowing His State Sentence Depends
"On Future Developments," Pleads Guilty.**

Bergman pled guilty in both federal and state courts on March 11, 1976.

District Court Judge Marvin Frankel accepted the plea with the understanding that Bergman was entering "an extremely informed, carefully considered, voluntary plea of guilty with no promises or understandings of any substance that have not been made clear and explicit on our

own records" (mins. at 33). This included the agreement with the state prosecutor, which was read into the record. *Id.* at 24-27.

On the same day, Bergman entered a plea of guilty to the state charge of offering unlawful fees and payments. Petitioner's exh. 4 at 17. Justice Melia, in accepting the plea, again emphasized that although the Special Prosecutor had agreed to recommend a sentence involving no imprisonment in addition to that to be imposed by the District Court, he was not bound to follow that recommendation:

The Court: Now I'm not saying that there will be additional time, and I'm not saying that there will not be additional time. The fact of the matter is that I do not know now. That will depend on future developments. Now do you follow me so far?

The Defendant: Yes, your Honor.

The Court: That is clear to you, Dr. Bergman?

The Defendant: Yes, your Honor.

Id. at 16. Bergman said that he knew he faced an additional four years. *Id.* at 17. Sentence was adjourned until June 14, the same date set for sentencing in the federal court. *Id.* at 18.

**Judge Frankel Sentences Bergman to Four Months,
Holding that Restitution Is No Concern of the
Federal Court.**

Accountants from the Office of the Special Prosecutor determined that Bergman's liability under the state plea agreement was at least \$2.5 million and communicated that figure to the defense on May 21, 1976. When the parties appeared before Judge Frankel on June 10, Bergman took the position, in Judge Frankel's words, "that \$2.5 million is crazy and they are hateful people for even suggesting it"

without bothering to suggest a counter-figure of his own. "I even expect that in a negligence case," Judge Frankel remarked. Mins. at 16-17, 20. But Judge Frankel "suspected"—wrongly, as it turned out—that the prosecutor's calculation was too "enthusiastic" (*id.* at 17), and once Bergman put forth a counter-offer of \$364,877 (*see* petitioner's exhibit 4 at 92), he refused to adjourn sentence awaiting resolution. Mins. of June 16, at 5-6. Although Hynes had itemized the entire \$2.5 million claim (respondents' exh. 2A), and Judge Frankel was told that Justice Melia had decided not to impose sentence without assuring himself that there was at least a procedure for ironing out the enormous differences (*id.* at 3), Judge Frankel noted that nothing in the plea bargain required sentencing on the same day and concluded that restitution was Justice Melia's "problem," not his (*id.* at 5). Determining how much Bergman actually "cheated the state out of" should be "left for the State Court" (mins. of Sept. 15 at 11), he later said, because "the repayment of Medicaid monies was a major concern of the State Court and no concern of the federal court" (memorandum opinion of Oct. 5 at 2).

Judge Frankel made it clear that his sentence would reflect only the two federal crimes that Bergman admitted committing. Mins. of June 10 at 9, 15-16, 26, 44. "There are cases in which the Court casts a kind of wide net in trying to figure out what is a just sentence," he acknowledged, but this would not be one of them. *Id.* at 25. Even Bergman's intertwined state plea of guilty to offering unlawful payments and fees to a New York legislator was treated as largely beyond the court's "narrow" (*id.* at 26) focus:

I tell you frankly, given the dismissal [of the indictment against Blumenthal] and given the fact that that is in the state court, though I am assuming this sentence will be the total sentence, I am not disposed to give much weight to that Blumenthal situation.

Mins. of June 16 at 43.

Judge Frankel thus sentenced Bergman not only as a "first offender" (416 F.Supp. 496, 501, 502), but also as "a man with distinguished reputation and a lot of evidently deserved credit"—one whose reputation has never been "seriously blemished in the past" (mins. of June 10 at 9-10). In order to reach this affirmative conclusion, Judge Frankel had to, and did, "skip over" the 1960 findings of the City Investigations Commission that six of Bergman's nursing homes had bilked the City out of \$1.1 million for skilled nursing services never supplied to patients; this Judge Frankel dismissed as "ancient history." *Id.* at 10. Similarly, he did not think that "how well or poorly people were treated in homes" was "terribly important." *Id.* at 9. "[A]s far as I am concerned, [Bergman] hasn't misbehaved in the past." *Id.* at 27.

The net result was a sentence of four months' imprisonment, considerably below the authorized eight years, on the stated basis of Bergman's "illustrious public life and works," the fact that it was his "first" and probably last conviction, and his age and imperfect health. 416 F.Supp. at 501.

**Reaction to the Federal Sentence Is Generally Adverse;
Bergman, His Lawyers and Hynes Comment.**

As the District Court found, "public response to the sentence was immediate, substantial and generally adverse." A. 11.

The Bergman camp, naturally, took the minority view. A. 24. Videotapes of television broadcasts showed parts of interviews with Newman and Lewin, at the steps of the federal courthouse, in which they defended the sentence as not excessively lenient. Petitioner's exh. 24. The tapes reveal that Bergman himself passed out a leaflet (respondents' exh. 4) to waiting reporters suggesting, in the words of the District Court, "that the proceedings had vindicated him." A. 47 at n. 23. Bergman's handout proclaimed that the "air is cleared and that the truth emerges." The "truth," as Bergman viewed it, was that his accountants were to blame for "99 percent" of the money wrongfully taken, "which I knew nothing about."

The Special Prosecutor was among the many who questioned "whether essential justice had been accomplished." Hynes had anticipated a lenient sentence since he learned, a few days before, that Judge Frankel did not believe Bergman really owed \$2.5 million as the result of Medicaid overpayments (Hynes: 103-114). He spoke with his public information officer, Alice McGillion, and her predecessor, David Jewell—then a congressional aide but still a close friend—about a response (Hynes: 127-29; McGillion: 665; Jewell: 1172-74). Hynes rejected one proposal, which he regarded as "too harsh," and elicited one which he intended to reflect his philosophy that white collar criminals be in-

carcerated (Hynes: 149; McGillion: 674). He wanted to communicate this feeling to the public, not to Justice Melia (Hynes: 157, 1458, 1461). Hynes failed to consider, and no one raised with him, the possibility that the publicity might undercut the sentence recommendation (Hynes: 155, 1461). Unlike Bergman and his attorneys, Hynes refused to be interviewed by reporters waiting at the courthouse or speak extemporaneously about the federal sentence; instead he informed them that he would issue his statement at his office later in the day, after the state court proceedings, *infra* (Hynes: 70, 83).

In that statement, Hynes was to admit that he was "extraordinarily disappointed" by the four month sentence. He explained that he was "deeply troubled and discouraged" by the cynical public perception of "special justice for the privileged" and feared that the success of his investigation would be adversely affected because patients, families and employees in nursing homes where abuse and thefts occurred would now "think twice" before coming forward with evidence. Hynes nonetheless vowed not to be deterred by "insubstantial prison sentences," and to "continue to vigorously investigate and prosecute criminals who thrive on the abuse of our elderly citizens." A. 43-44
 * n. 11.

In addition to the extensive media coverage, including a New York *Times* editorial criticizing the sentence (petitioner's exhs. 3, 6), Stein implored the public to write to Justice Melia in order to counteract the hundreds of obviously solicited letters which Bergman's supporters had sent to Justice Melia and earlier to Judge Frankel. Peti-

tioner's exh. 4 at 47-48; mins. of June 10 at 2. Stein also sought to remind Justice Melia of the despicable conditions in the Bergman Homes. *Id.* at 48; Stein: 618, 637-38). Hynes' statement became "lost in the general dim." A. 36.

The State Court Sentencing Is Delayed Because Bergman Contends He Has No Time Limit in Which to Make Restitution, or Even Agree on an Amount.

In state court, Bergman's attorney made what the District Court found to be a "*pro forma* request that sentencing take place at that time." A. 10. Bergman was not even present, because his attorneys had already been told by Justice Melia that he was "shocked" by the defense's stated position that sentence be imposed "and maybe in the year 2010 we will get around to determining how much is due and owing and how much will be paid. * * * I let counsel know yesterday that that is not going to happen here." Petitioner's exh. 4 at 32.*

Justice Melia was astonished by the disparity between the prosecutor's calculation of \$2.5 million and Bergman's offer to repay \$360,000. "Right on the face of it, there is something wrong there. Somebody is not acting in good faith. I don't know who," he said, but "the documentation seemed to weigh heavily in favor of \$2,500,000." *Id.* at 30, 67. Justice Melia had hoped to impose sentence on the same day as Judge Frankel, but he would not do so unless

* Hynes repeated essentially the same thing to reporters later that afternoon underscoring his right to declare the agreement "a nullity" if Bergman continued to not cooperate. Hynes spoke, as the District Court found, "conditionally." A. 44 at n. 11. (One answer used the present tense, but there is no evidence that the question was other than hypothetical. *Id.*)

things were "in place." *Id.* at 30-31; Melia: 1062-66. The people of New York were "entitled to two things," he stressed: "to know how much money is due and owing to them from these Medicare [sic] discrepancies * * * and to be paid back that money." Petitioner's exh. 4 at 31. Justice Melia deminded Bergman that the Court had no commitment to follow the prosecutor's recommendation and that if he found a lack of good faith in resolving the restitution, "that will be taken into account" when sentence was imposed. *Id.* at 31-32.

During the week of July 2, Justice Melia again met with the parties. By then, the defense conceded that it owed \$1.4 million, but opposed any substantial down-payment or binding arbitration. It still urged the imposition of sentence "without any payment and with no resolution of the amount due." Petitioner's exh. 4 at 40. When Justice Melia agreed to Newman's request to pronounce sentence on July 2, "on state of the record as it presently is," Bergman personally interrupted to plead for another adjournment "until he has straightened out the restitution figure." *Id.* at 41-44. Justice Melia consented, but repeated that he wanted not merely resolution of the figure but a "substantial" down payment and an acceptable program for payment of the rest. This would be the last adjournment, he warned, and repeated that he was "not tied to any sentence agreement with anybody, covertly or otherwise, on the record [or] off the record * * *." *Id.* at 47.

Nearly thirty meetings were held in the ensuing weeks. When an impasse was reached, Price-Waterhouse was appointed to arbitrate. Within days after the initial meeting

with the arbitrator, Bergman conceded that his liability was indeed \$2.5 million. But repayment remained an issue; Bergman contended he had no cash or liquid assets. Petitioner's exh. 4 at 54, 93-95. The arbitrator suggested a performance bond to secure full payment or, failing that, a complete surrender of Bergman's assets to the State. *Id.* at 54, *see* exh. 20.

Sentencing was to occur on the morning of September 14, 1976, whether or not an agreement was reached. *Id.* at 47, 49. On the night of September 13, both sides were still apart. Bergman told one assistant attorney general that he would not sign anything until he was given a "signal" that Justice Melia would not impose any additional sentence. Bergman was told that such a thing was impossible (Schwartz: 1341-42).

Hynes did not know what would happen the next day. But, "if Mr. Bergman lived up to the terms of his agreement I was prepared to live up the terms of my agreement" (Hynes: 1479). One draft of what Hynes would say in such a case was prepared by the press officer and her predecessor. "We handed it over to the lawyers. They didn't like it and [Hynes] killed it" because the legal staff convinced him that the draft did not adequately comport with the promise (Bourgeois: 261-63, 316, 322; Jewell: 1246). Hynes emphasized that he had a professional duty to perform and "I was not interested in my press image" (Hynes: 1479). "He said there was nothing he could do; he had made a plea bargain and he had to stick to it" (Jewell: 1226).

**Justice Melia Explains Why He Cannot Follow
the Prosecutor's Recommendation and Imposes
a One-Year Sentence.**

On the morning of sentence itself, Bergman and his wife finally signed over their assets to a restitution fund set up by the Special Prosecutor's Office and to be independently administered by a court-appointed receiver nominated by Hynes: former United States Attorney General Ramsey Clark. Bergman's attorneys stated that the substantial down payment which Justice Melia had sought was to be \$250,000 "which we have in certified checks [and] bank drafts" and which would be paid "within the next 24 hours to the Special Prosecutor." Petitioner's exh. 4 at 52, 54.*

Hynes was now prepared to make his recommendation. Bergman had agreed to "two essential items," he reminded the Court, "cooperation and full restitution." Bergman had cooperated and agreed to continue to do so, Hynes reported. A. 51. Although restitution had been obtained only with extreme difficulty and by the most complex mechanisms, "now, at the eleventh hour" Bergman had "effectively turned over all his assets." A. 52.**

Since both items of the agreement have now been satisfied I have the obligation to fulfill my commitment under the March 4th agreement and, Your Honor, would recommend that whatever sentence you impose

* As the District Court noted, this promise was promptly ignored and it took Clark nearly half-a-year before a dollar was realized. A. 45 at n. 15. Nearly \$2.2 million is still outstanding as of this writing.

** The documents accompanying the confession of judgment revealed that the majority interest in Bergman's multi-million dollar nursing home empire was in the names of other members of his family.

be a concurrent one with the federal sentence on June 17, 1976.

Hynes added the caveat that if the apparently "fail-safe" method of restitution were somehow thwarted, he would prosecute whatever surviving charges against the Bergmans he could. A. 53-5.

Gustave Newman, Bergman's attorney, asked "for a clarification" of the word "concurrent." Newman wanted to be sure Hynes was asking for "no sentence additional to that imposed by the United States District Court." Hynes assured him, "That is my recommendation." Newman said, "Thank you Mr. Hynes. That makes my question academic to Your Honor." A. 56.

Justice Melia gave "great weight" to the prosecutor's recommendation and noted Hynes' reasons—including Bergman's having admitted his conduct, and the plea and sentence in the District Court—but could not abdicate his own responsibility. Petitioner's exh. 4 at 64-65, 69-70. As sentencing judge, Melia had to make his own appraisal of the "crime committed and the person who committed it." *Id.* at 63.

First, the crime was by no means a "minor" one. Bergman had intentionally attempted to corrupt an elected official for his own gain. *Id.* at 63. The Department of Probation had interviewed Bergman and perceived him as

an unscrupulous and corrupt individual who apparently resorted to illegal and fraudulent practices and one whose ethical precepts became warped in his desire for financial gain.

He evidences no [compunction about attempting to influence] high legislative and government officials to achieve his own ends.

Justice Melia agreed. *Id.* at 70-71.

As for the defense's contention that Bergman was a dupe of his accountants, who unjustly enriched him to the tune of \$2,500,000 without his knowledge:

It is strange that these underlings never made an error on behalf of the State. Now, I find it difficult to believe that a man, the possessor of several degrees, who has amassed substantial [gross] worth in many enterprises could do so or did so without keeping a firm hand on the wheel and his foot on the throttle.

Id. at 71.

But what evidently concerned Justice Melia most about Bergman was his "consuming interest in the preservation of unearned gains." *Id.* This was eloquently demonstrated by Bergman's procrastination in the restitution negotiations:

Three months after the plea in March of 1976 the defense had calculated no figure of its own as to what was owed to the taxpayers. This was very disconcerting to me. Now, a reading of the provision [paragraph 8 of the plea agreement] would lead to the conclusion that the resolution of the amount [and] payment would be arrived at prior to sentence.

* * *

I think there was total default in this provision at that time and this seemed to me to evince a lack of good faith. The defense claims, as I see it at that time, reso-

lution of the amount owed and the payment thereof were to be agreed to but there was no agreement on when either event would occur.

This again appeared to be playing fast and loose and * * * I refused to proceed to sentence. * * *

Now, restudy and a quick restudy raised the defendant's admission to \$1,400,000. Further negotiations have now resulted in an admission by the defendant that he does indeed owe the State \$2,500,000. However, I have not been greatly impressed by the defendant's good faith in the resolution of this issue. Even the application of eighth grade arithmetic would reveal there has been a remarkable increase from zero dollars to \$364,000; to \$1,400,000; to \$2,500,000.

Id. at 66-67.

As the District Court found, "Justice Melia considered these factors as he approached one of the most sensitive tasks assigned to a judge—the decision whether to imprison another human being." A. 38. Expressly taking "into account the recommendation of the Special Prosecutor and the financial arrangements made," Justice Melia imposed, in lieu of a sentence of four years, a sentence of one year, to be served consecutively to the federal sentence. *Id.* at 71-72. The one thing Melia did not think about, whatsoever, was Hynes' statement to the press three months before (Melia: 1075, 1147-48).

Bergman Decides that on No Account Will He Withdraw His Plea and Forego the Advantages of His Brief Federal Sentence.

Judge Frankel had for months shared the obvious concern that the plea agreement was in danger of being nullified in state court because of the difficulties over res-

tution. Mins. of June 25 at 18, 24. That, in turn, would raise a question as to the validity of the federal plea and he granted an adjournment of surrender because no one "should be made to begin to serve a prison sentence in circumstances like these." *Id.* at 26. Judge Frankel mentioned Hynes' out-of-court criticism of the federal sentence, but no motion was made to withdraw the plea on this or any other ground. *Id.* at 8.

When Judge Frankel asked if there was "a realistic possibility" that Bergman would do so, he was told that "in all candor, that possibility depends on the sentence that Judge Melia imposes." Proceedings of July 9 at 4-5. Judge Frankel reminded Lewin that there was no understanding as to what Justice Melia would do—only a recommendation—and Lewin conceded that the possibility of a greater state sentence was increasing as Justice Melia's dissatisfaction over the lack of progress in the restitution negotiations grew. Still, "what we will do depends," Lewin said, in part "on what Judge Melia does." *Id.* at 5-7. Lewin was told that Bergman must decide by September 16. *Id.* at 23.

On September 15, one day after the imposition of the one-year state sentence, Bergman's attorneys again appeared before Judge Frankel. They had repeatedly discussed the question of withdrawing the plea with Bergman and members of his family. The *Santobello* issue was discussed, and the possible effect of Hynes' out-of-court statement weighed, but the answer was "no" (Lewin: 441-44). Bergman was not "on any account" seeking to withdraw the plea:

he is not prepared to withdraw the plea in this court and subject himself at present to any trial or any further proceeding here in that regard.

Mins. of Sept. 15 at 3-4. There was, Lewin testified, a strategic decision not to pursue withdrawal of the plea but instead "to take the federal sentence and hope to defeat the state sentence on the grounds of a *Santobello* argument" (Lewin: 454-56). As the District Court found:

* * *

The ultimate choice not to move to withdraw the plea was made with the assistance of competent counsel, again and again, throughout the period of alleged *Santobello* violations by the Special Prosecutor.

If the Special Prosecutor's actions breached the agreement, the time to assert this was prior to the passing of sentence. Had Bergman's counsel then sought to withdraw the plea, the merits of their position would be much more apparent. They chose, rather, to keep the benefits of the bargain already received (the brief federal sentence), thereby accepting whatever breaches may have occurred.

A. 32.

Bergman Attempts to Overturn the State Sentence.

After serving his four month federal sentence at the end of 1976, Bergman appealed the state judgment to the Appellate Division, First Department. His primary contention was that Hynes did not comply with his promise to recommend no additional sentence. Exh. at Pt. I. Although the brief asserted that Hynes had made a speech "on the steps of the federal courthouse" calling the federal sentence "an outrage and a travesty" (*id.* at 6, 13), the record on appeal contained no reference to that discredited allega-

tion or to Hynes' (or Bergman's) actual out-of-court statements. The Court ruled from the bench that it would not address matters outside the record. A. 45 at n. 18. On May 10, 1977, it affirmed unanimously and without opinion. 57 A.D.2d 749. On June 1, Judge Sol Wachtler of the Court of Appeals denied permission to appeal to that Court. 42 N.Y.2d 890. An application for resentence before Justice Melia was denied on June 23 and on July 8, a request for a stay or bail pending an application for a writ of certiorari was denied by Mr. Justice Thurgood Marshall. On the same day, Bergman brought the instant application for a writ of habeas corpus, which, after an extensive hearing, was denied on October 4, 1977. A stay issue on July 11 (WARD, J.) has been continued.

ARGUMENT

POINT I

The plea bargain was kept when the Special Prosecutor recommended no sentence additional to that imposed in the District Court by Judge Frankel [answering petitioner's Point I].

- A. The Special Prosecutor's recommendation would have been ignored as "rank hypocrisy" without a candid assessment of the restitution situation.**

As the District Court below found, the tripartite plea agreement among petitioner and the federal and state prosecutors was unusual not merely in its complexity but in the nature of the compliance it required. In the classic situation, the defendant completely fulfills his obligation by entering a plea and the prosecution is then required to come forward with whatever recommendation it has promised.

Santobello v. New York, 404 U.S. 257 (1971). "The Bergman plea bargain, in contrast, contained a number of mutually dependent promises with each side expecting cooperation from the other over an extended period of time." A. 18.*

The major dispute, the District Court found, concerned restitution. A. 22. Bergman took the position, which he no longer presses, that the plea agreement entitled him to immediate performance of the prosecutor's sentence recommendation, and immediate sentence, "and maybe in the year 2010 we will get around to determining how much is due and owing and how much will be paid." Petitioner's exh. 4 at 32. Although the District Court, like the state court, faulted the imprecise written agreement, both courts knew the intent of the parties. Former Chief Assistant Prosecutor Howard Wilson testified that the parties spoke of restitution as an integral part of the agreement and understood that, at a minimum, the \$1 million involved in the larceny counts of the indictment would be paid, or at least guaranteed, by the time of sentence (Wilson: 1367-68, 1379, 1383, 1392-93, 1399, 1402-03). Justice Melia had been assured by "counsel on both sides" in March that "all would be well. It would be determined and taken care of long before-hand, Judge." Dismissing the petitioner's sentence-now-pay-later argument as "simply untenable," the

* For example, the prosecutor's presentence submission was to compare the evidence he acquired with the factual charges made against Bergman in 1974 and early 1975. A. 60 (§10). This was to include the number of nursing homes Bergman owned (Wilson: 997, 1001-02), but when Bergman refused to permit the prosecution access to the relevant books and records, the prosecution stated that it could not minimize Bergman's role in the industry. Respondents' exh. 12(a)-(f). The parties agreed to treat these "breaches" as mutually offsetting. A. 46 at n. 21.

District Court found the agreement to be as Wilson described it. "Bergman's performance of all the duties outlined in the agreement was the obvious *quid pro quo* of the prosecutor's performance." A. 22-23.

Bergman's intransigence was obvious and intolerable to Justice Melia. Bergman had refused to even submit a figure until the sentencing in the District Court began in June, and then only at Justice Melia's and Judge Frankel's insistence. Petitioner's exh. 4 at 23; mins. of June 10 at 16-17. At that, the figure was a "palpably absurd" \$364,000, as compared to the carefully arrived at \$2,500,000 demanded by the State. Petitioner's exh. 4 at 23. When Justice Melia directed a meeting of the accountants, it was discovered that the Bergmans' never heard, or asserted they never heard, of the Health Information Manual setting forth the basic guidelines for Medicaid reimbursement. *Id.* at 24. It was as if a taxpayer's accountants claimed never to have heard of the Internal Revenue Regulations. Moreover, even a "casual look at the documentation seemed to weigh heavily in favor of \$2,500,000," Justice Melia realized, and obviously "a heavy case of foot-dragging was afield." *Id.* at 67. By July, the Bergman figure had crept up to \$1,400,000, but only the appointment of Price-Waterhouse as arbitrator in August resulted in an admission "that he does indeed owe the State \$2,500,000." Finally, a transfer of assets was effected on the morning of state sentence itself. *Id.* at 53-54, 67.

It is in this context that petitioner complains that the Special Prosecutor's recommendation of no sentence additional to that imposed in the federal court was too "tepid" and not in literal compliance.

Hynes did refer to the "difficulty and complexity" of the restitution negotiations and to his resolve to prosecute on new charges if the final arrangements were subverted. A. 51-55. Unlike the prosecutor in *United States v. Crusco*, 536 F.2d 21 (3d Cir. 1976), who bound himself to total silence, Hynes expressly reserved the right to evaluate the nature of Bergman's cooperation at sentencing. A. 60; petitioner's exh. 4 at 10. But, he told Justice Melia, "as we stand here today," Bergman had complied and Hynes made his recommendation. A. 52-56.

Petitioner argues that he was entitled to have the recommendation expressed with "some degree of advocacy." *United States v. Brown*, 500 F.2d 375, 377 (4th Cir. 1974). Hynes, to be sure, could have pretended that the preceding six months of wrangling never occurred and simply mouthed the words of the agreement. But "he was not required to stultify himself," 500 F.2d at 379 (Haynsworth, Ch. J., dissenting), and to have done so would have reflected no credit on him or Bergman: "after the bitter controversy over restitution, it would have been rank hypocrisy." A. 27. And Justice Melia, who "had already been involved in numerous on and off the record discussions" and "had supervised the continuing arguments of counsel and showered his impatience with the extended restitution negotiations" would have known it. A. 26-27. Indeed, he had prepared his extensive assessment of Bergman's "footdragging" and its relevance to sentencing before he had even heard Hynes' remarks (Melia: 1080; Petitioner's exh. 17). For Hynes to have ignored reality would have been to invite Justice Melia to ignore him.

Hynes' candid assessment of Bergman's compliance plainly benefited Bergman far more than his and his coun-

sel's self-serving hyperbole. Judge Melia was singularly unimpressed with Bergman's solicited accolades and his excuse that everything was the fault of his accountants. It was only "the recommendation of the Special Prosecutor and the financial arrangements made" which finally convinced him not to impose a sentence of four years. Petitioner's exh. 4 at 47, 71-72; Melia: 1079. Bergman was, the District Court found, satisfied at the time (A. 27) and can hardly be heard to complain now.

For much the same reasons, a verbatim incantation of paragraph four of the agreement by Hynes would at best have been superfluous and at worst counterproductive. Justice Melia was, the District Court found, "intimately acquainted" with the reasons for originally making the promise, *i.e.*, that Bergman had admitted the facts of the Blumenthal offer and that Judge Frankel would know of all the facts when he imposed sentence. A. 25. Hynes had said so explicitly to Judge Melia when the plea was entered:

The reasons for our recommendation being that Bernard Bergman has told us the facts which have resulted in this indictment, and that Judge Frankel will know of those facts at the time he imposes his sentence.

Pétitioner's exh. 4 at 9. This consideration was set out in the formal agreement which, Bergman's attorney conceded, had been read over and over by Justice Melia. *Id.* at 36. Justice Melia expressly noted at sentence that one of the professed mitigating circumstances was Bergman's disclosure of the facts. *Id.* at 69. All that could have been added was that Judge Frankel had presumably reflected

the state crime in his sentence and, given Judge Frankel's contrary decision not to "give much weight to that Blumenthal situation" (mins. of June 16 at 43), and it would, again, have been transparent hypocrisy to say so. Such a statement could only have reminded Justice Melia that the recommendation was based in part on a mistaken premise, thus conveying the very type of inconsistent message petitioner decries.

B. Hynes's previously expressed disappointment with the sentence did not violate the plea agreement.

The Special Prosecutor had been, of course, extraordinarily disappointed by the four-month sentence imposed by Judge Frankel, and had said so publicly (Hynes: 79-80). The District Court severely criticized the issuance of this statement (*see* Point II *infra*) but squarely held that it did not violate the plea agreement.

The parties had made no agreement explicit or otherwise, about public statements after sentencing. * * * Moreover, the absence of such an agreement—even an implicit one—is further evidenced by the fact that Bergman and his counsel also felt free to make public statements following the sentencing, and they did so.

A. 24. And even if there were some unstated understanding, the Court held, it could not be reasonably argued such an understanding induced Bergman's plea. *Id.* Bergman was bargaining for, and obtained, narrowly drawn pleas to a small part of the serious federal charges facing him, immunity from prosecution on all other federal and state charges except the violation of section 77 of the Public Officers Law, and a recommendation of no additional sentence on that charge. Bergman had demonstrated no in-

terest in having Hynes enjoy making that recommendation or in having him approve of what Judge Frankel decided. "The plea bargain was carefully negotiated and drafted" to include all material terms and these, the District Court expressly found, did not include the absence of public statements. A. 24, also A. 6. The District Court's factual finding that the plea did not rest "to any significant degree" on such an unstated understanding is "not clearly erroneous," and therefore, as this Court has held, no violation of *Santobello* may be asserted on that ground. *United States v. Podell*, 519 F.2d 144 (2d Cir.), *cert. denied* 423 U.S. 926 (1975).

Petitioner seeks to avoid this factual finding by contending that the District Court became "confused" between public statements in general and those which potentially undercut the sentencing recommendation (brief at 19-21). He suggests that the Court's explicit finding that there was "no agreement, explicit or otherwise, about public statements after sentencing" (A. 24) is somehow reconcilable with an agreement barring public statements with a particular content. The District Court can be assumed to know the meaning of the word "no." And for it not to have intended its finding to apply to the very statement complained of here, the Court would have to have been far more than merely confused.

Petitioner urges that he had a right to implicitly rely on the prosecutor's adherence to the law and to the canons of ethics concerning presentence publicity (*see* Point II, *infra*). He argues (brief at 18-19) that it would have been unnecessary, and indeed offensive, for him to expressly include such a clause in the agreement. The argument is

appealing, so far as it goes. But by the same token, Hynes could have expected that Lewin and Newman would not make their "this man has suffered enough" pitch to the reporters outside the federal courthouse. For that matter, he could have assumed Bergman would not illegally park in the judges' parking lot. See petitioner's exh. 3F. But every wrong is not a *Santobello* violation. The test is not what petitioner could have expected, but what he actually did rely on and whether that reliance, to any significant degree, actually induced the plea. 404 U.S. at 262; *Podell, supra*. The Court found as fact that there was no reliance on that or any other unspoken assumption, that every critical consideration in this case was reduced to writing. A. 24. The evidence is clear that no one considered Hynes' post-sentence posture a *quid pro quo* of the plea and thus his statement, whatever its propriety in the abstract, did not constitute a ground to undo the plea.

Petitioner argues (brief at 22-25) that if the prosecutor had delivered his press statement directly to Justice Melia at sentencing his remarks would have crossed the boundary between candor and self-contradiction. He claims that no distinction should be drawn between in-court compliance and what the judge may have become aware of through the media. But *Santobello* itself supports such a distinction. There the Supreme Court sanctioned, as a remedy for the prosecutor's breach, resentence before another judge and "specific performance" of the prosecutor's promise not to recommend any sentence. 404 U.S. at 263. Surely the Supreme Court had no doubt that the judge who would ultimately resentence Sanobello would be aware of the prosecutor's earlier recommendation of a year's imprisonment—it was, after all, quoted in the published opinion of the Supreme Court. No sentencing judge could have

found any reason to believe that those views had changed. Yet the Supreme Court required no more than an in-court performance of the original promise before a judge who had not been formally presented with the inconsistent position and could be presumed to have the integrity to decide the case on what was properly before him. Bergman received precisely that and, under *Santobello*, he is entitled to no more.

This is not to say that a prosecutor is at liberty to use the media to accomplish indirectly what he may not do directly. But *Santobello* is unique in that it creates reversible error even where it is clear beyond a reasonable doubt that no prejudice ensued. That approach has not been, and should not be, extended beyond a case, such as *Santobello*, where the record is incompatible with the appearance of justice. Absent such a situation, prejudice should, under all traditional tests, be proven. See Point II, *infra*. This Court's decision in *Palermo v. Warden*, 545 F.2d 286 (2d Cir. 1976) appears to be the only federal case purporting to extend *Santobello* to an out-of-court statement by the prosecutor. Yet, the result could have been reached on traditional grounds: the District Court there found that if the prosecutor had kept his promise to secure early parole, petitioner "would have been released from prison in August, 1970." 545 F.2d at 296. Similarly, in *People v. Kaanhe*, 559 P.2d 1028, 19 Cal. 3d 1 (1977), upon which petitioner so heavily relies, the Court found it "quite possible" that the prosecutor's recommendation led to a less favorable probation report. *Id.* at 1037, 19 Cal. 3d at 15.

The evidence here is undisputed that Hynes never told Justice Melia of his view of the federal sentence (Hynes:

230). Although Justice Melia generally reads the New York *Times*, and watches television, he had no recollection of reading or hearing what Hynes had said (Melia: 1067, 1098, 1141-42). He did read that Judge Frankel criticized Hynes' criticism of him, but by the time he imposed sentence, three months later, he had dismissed the entire incident from his mind (Melia: 1067, 1075, 1086, 1148). The District Court, therefore, properly analyzed the problem as one of potential prejudicial publicity. Hynes' statement, even if it created a danger that it would adversely affect the persuasiveness of his recommendation, or was wrong on other grounds, simply does not make out a violation of *Santobello*.

C. There was no promise or obligation to consent to reversal or resentence.

Petitioner also argues that the prosecution violated *Santobello* when it defended the judgment on appeal and opposed resentence.

On appeal, petitioner argued that the prosecutor's conduct at and preceding sentencing violated *Santobello* and that, even if it did not, the sentencing court abused its discretion in sentencing Bergman to an additional year. The prosecution responded that no *Santobello* violation occurred and that the sentence was justified even if it was not the one recommended by the prosecutor below. No cited or known appellate decision applying *Santobello* has, as petitioner urges, found error in the participation by the prosecutor in the appeal. Nothing in the prosecutor's promise to recommend the imposition of a particular sentence required him to falsely say that he had not done so or to

wrongly concede that the sentencing court, following its own best judgment and having before it an extensive probation report, committed reversible error in not following that recommendation. *United States v. Ewing*, 480 F.2d 1141 (5th Cir. 1973), is, as the court below noted, distinguishable in that it involved a motion addressed purely to the discretion of the sentencing court under Rule 35. A. 29. The State appeal, on the other hand, involved two legal questions: whether *Santobello* had been violated below and, if not, whether the sentence was a "clear abuse of discretion" by the sentencing court. *E.g. People v. Junco*, 43 A.D.2d 266, 268 (1st Dept.), *aff'd* 35 N.Y.2d 419 (1974), *cert. denied* 421 U.S. 951 (1975).

On June 23, 1977, after the judgment had been affirmed and further appeal denied, petitioner sought in the trial court to set his sentence aside. As the District Court found:

It is unreasonable to contend that the prosecutor was bound by his plea bargain to concede jurisdiction if, in fact, none existed. Such an action would be tantamount to participating in a fraud upon the court. Where the prosecutor does that which he is required to do, an argument that he impliedly agreed not to is frivolous. *United States v. Michaelson*, 552 F.2d 472, 475 (2d Cir. 1977). Clearly, the prosecutor had a right to defend the independent sentencing decision of the state court, so long as he did not take a factual position different from that which he was required to take in his sentencing recommendation.

A. 29-30. The prosecution argued alternatively that if jurisdiction existed, the trial court was empowered to vacate its sentence only upon a compelling showing of new circumstances. Petitioner's exh. 8 at 38-41. The only references

to the facts were to support the contention, upheld by Justice Melia, that none had changed. *Id.* at 44-53. Hynes also took issue with the general proposition that no white collar criminals should be incarcerated. *Id.* at 54. But he made no reference to what sentence Bergman deserved; he simply reminded Justice Melia that the court had already acted "within your discretion," was upheld by the Appellate Division and the matter thus had been "fairly dealt with." *Id.* at 55-56. The Court found no grounds upon which to vacate its sentence and the prosecutor had no occasion to recommend a different one.

POINT II

The prosecutor's public statement concerning his disappointment in the federal sentence did not deprive the petitioner of a fair sentencing procedure in the state court [answering petitioner's District Court brief as "incorporated by reference"].

The District Court viewed Hynes' public expression of his extraordinary disappointment in the four-month federal sentence as violative of the New York Code of Professional Responsibility, which provides, under the heading of "Trial Publicity," that an attorney associated with the defense or prosecution of a criminal matter may not make an extrajudicial statement if it is to be expected that it will be disseminated and if it is "reasonably likely to interfere with a fair trial" or "affect the imposition of sentence." Disciplinary Rule 7-107, subd. (D)(E).

Although the State Appellate Division has authoritatively restricted the application of this rule "only to those

situations where it is found that the extrajudicial statements present a 'clear and present danger' to the administration of justice," *Markfield v. Association of the Bar*, 49 A.D.2d 516, 517 (1st Dept. 1975), the District Court found that construction applicable only to disciplinary hearings and held that "whatever the rule might be in that context, it is clear that such prosecutorial statements in the context of a pending criminal case are improper and can be prejudicial." A. 33. The determinative fact, however, was that Hynes' statement was not prejudicial. "[P]rosecutorial misconduct, in the abstract, does not violate the constitutional rights of the defendant unless it has a prejudicial impact on the proceeding * * *." A. 34-35.

The Court was correct in its reading of the law respecting pretrial publicity. In *Murphy v. Florida*, 421 U.S. 794 (1975), the Supreme Court held that there is no constitutional presumption that jurors are prejudiced merely because they are aware of a defendant's criminal record; the petitioner must demonstrate "the actual existence of such an opinion in the mind of the juror." 421 U.S. at 800, citing *Irwin v. Dowd*, 336 U.S. 717, 723 (1961). Prejudice must be sustained "not as a matter of speculation but as a demonstrable reality." *Beck v. Washington*, 369 U.S. 541, 558 (1962).

Surely the same burden is present when the allegation is that the sentencing judge was prejudiced. As the Court below found, it was not met. A. 35-36. Justice Melia unequivocally testified that when he imposed sentence in September, 1976, he did not give "a thought" to what had earlier appeared in the press (Melia: 1075). As the District Court pointed out, nearly three months had elapsed, Justice Melia

could not even recall having read the statement, and "in light of the public furor that followed the federal sentencing, it is apparent that Hynes' voice was lost in the general din." A. 35. As petitioner's own attorney noted in state court, Justice Melia had vigorously condemned attempts, by persons other than Hynes, to influence him through the media (petitioner's exh. 4 at 49), and counsel concluded that "anybody who has followed the history of this case could not believe for a moment that this Court could be influenced by any press disclosures." Petitioner's exh. 8 at 5-6, 7. It ill behooves petitioner to now assert that Justice Melia was presumptively incapable of disregarding public sentiment simply because he might someday seek to be elected to the State Supreme Court (*see* brief at 43).

The District Court wisely refused to fashion a new "exclusionary rule" to deter errors in judgment by prosecutors. A. 36. It is not needed. When Hynes became aware that his conduct had been questioned by distinguished members of the bar, he rethought his position on publicly criticizing sentences and decided it was inappropriate to do so (Hynes: 1467-68). It never happened again (Hynes: 1459). As a high-ranking public official and a practicing attorney, Hynes could not help but be responsive to the criticism of his conduct by the bar and, now, two respected United States District Court Judges. *Cf. Stone v. Powell*, 428 U.S. 465 (1976). This constructive criticism is a far more suitable and just method of "righting the wrongs of prosecutorial excesses," *Palermo v. Warden, supra*, 545 F.2d at 300 (Bartels, J., dissenting), than extending the exclusionary rule and thereby allowing another class of defendants to avoid the consequences of their crimes. Hynes did not intend, or even foresee the possibility of,

prejudice from his statement. Now knowing of that possibility, he can be expected to avoid reoccurrence without the added impetus of freeing Bernard Bergman.

No court has seen fit to aggravate a defendant's sentence in order to deter violations of the same disciplinary rule by defense attorneys. Petitioner suggests no consequences that ought to flow to him from his attorneys' well-publicized declarations from the courthouse steps to the effect that he had "suffered enough," the very theme they invoked at sentencing. By the same token, neither should the People of the State of New York be denied justice in order to penalize their attorney. This Court has yet to punish immaterial failures by federal prosecutors in compliance with plea agreements. *United States v. Podell*, *supra*. It should not begin to do so here.

POINT III

Petitioner's failure to utilize state remedies bars issuance of the writ in any event [answering petitioner's Points II and III].

A. Petitioner knowingly and intelligently waived any objection to the prosecutor's conduct in a calculated decision not to risk losing the benefit of a brief federal sentence.

Even if this Court rejects the decision of the District Court and holds that Hynes breached the agreement or committed other constitutional error, it must then determine whether petitioners remedies were forfeited by a deliberate by-pass of the orderly procedure of the state courts, *Fay v. Noia*, 372 U.S. 391, 438 (1963), or by a failure to raise a

timely objection. *Wainwright v. Sykes*, — U.S. —, 97 S.Ct. 2497 (1977); *Gates v. Henderson*, — F.2d — (2d Cir. 1977) (*en banc*). The Court below found both:

If the Special Prosecutor's actions breached the agreement, the time to assert this was prior to the passing of sentence. Had Bergman's counsel then sought to withdraw the plea the merits of their position would be much more apparent. They chose, rather, to keep the benefits of the bargain already received (the brief federal sentence), thereby accepting whatever breaches may have occurred.

A. 32. It found, as fact, that the decision was part of "a carefully calculated course selected by skilled counsel."

[T]he decision was made to ride with the guilty plea in the hope that no additional sentence would be imposed, with the alternate strategies of appealing in the state court any sentence that might be given and petitioning this Court for a writ of habeas corpus if the earlier strategies did not succeed.

A. 31-32. Competent counsel, aware of all possible constitutional claims (A. 31), consulted extensively with each other, and with petitioner and his family, and the decision was made not to raise any *Santobello* claim which might have endangered the beneficial federal sentence (Lewin: 441-44). Petitioner's counsel instead thanked Hynes for making his recommendation and told the state court that his question as to Hynes' compliance was rendered "academic" once Hynes defined the word "concurrent." A. 56. Only after Bergman was secure in the knowledge that he could never be resentenced to what was appropriate for the massive Medicaid fraud originally charged, did he even seek a reduction in the state sentence.

Petitioner's transparent attempt to "have it both ways" (Frankel, J.; mins. of Sept. 15 at 10) cannot be countenanced:

If a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection.

Wainwright v. Sykes, *supra*, 97 S.Ct. at 2508. Under section 470.05, subd. 2 of the New York Criminal Procedure Law, a question of law is preserved for purposes of appeal only when the party claiming error protests, either contemporaneously or at a subsequent time when the court had an opportunity to effectively act upon it. A prosecutor's statements, even if "clearly improper," ordinarily must be objected to at the time they are made in order to preserve a question of law. *People v. Wood*, 12 N.Y.2d 69, 78 (1962) (capital case distinguished). Where "no objection was made," even to name calling and inflammatory statements by the prosecutor, the legal issues "were not preserved." *People v. Kuss*, 32 N.Y.2d 436, 445 (1973), *cert. denied* 415 U.S. 913 (1974). Where no objection is made to the imposition of sentence under known circumstances, the defendant is deemed to have waived any objection based upon them. *People v. Johnson*, 252 N.Y. 387, 391 (1930). A complaint that the trial judge had excessive pretrial contact with the case cannot, absent special circumstances, be raised for the first time on appeal. *People v. Erazo*, 34 A.D.2d 623, 624 (1st Dept. 1970), *aff'd* 28 N.Y.2d 617 (1971).

Those states which have addressed the issue squarely have held that a failure to contemporaneously object to the prosecutor's performance precludes appellate relief. In *People v. Barajas*, 103 Cal. Rptr. 405, 408; 26 Cal. App. 3d

932, 937 (1972), the prosecutor, who had agreed to remain silent at sentencing, told the court that the defendant was probably a heroin dealer. The appellate court agreed the prosecutor had intentionally broken his word, but held:

Nonetheless, we find no basis to reverse on the ground urged. The defendant is not entitled to the benefit of the trial court's originally announced intention to place him on probation merely because the prosecutor violated his promise. Where the prosecutor repudiates its part of the bargain, the defendant's remedy is to move to withdraw his plea of guilty in the trial court. [Citations omitted]. Unless he makes such a motion in the trial court, he is precluded from obtaining relief on appeal. [Citation omitted]. Although Narajas had the time and opportunity to move to set aside his plea of guilty in the trial court, he did not do so. He has failed to preserve the issue, and we are precluded from granting relief on that basis.

In *Bernhart v. State*, 368 A.2d 1124, 34 Md. App. 632 (1977), the prosecutor's statement that the State considered the defendant's crime "a most serious case" was alleged, on appeal, to have violated his promise not to make a sentence recommendation. The appellate court agreed, but held that the failure of the defendant or his counsel to complain or object before the trial court, which would have had ample time and opportunity to take remedial action, precluded the right to a vacation of the sentence on appeal.

Although, as petitioner argues, New York does not appear to have yet had the opportunity to apply its statutory contemporaneous objection rule to a claim that the prosecutor's statements at sentencing violated his plea agreement, there is no reason to assume it will not. In *People v. Esposito*,

sito, 32 N.Y.2d 921 (1973), the Court of Appeals held that the failure of a defendant to remind a court of its sentencing promise was not a waiver under the federal pre-Sykes standard of "knowingly and intelligently." But, even on its own terms, *Esposito* clearly contemplates a strategic decision by a defendant not to pursue a complaint which, in Judge Goettel's words, could land him "back in the soup" (454). As this Court recognized in *United States ex rel. Selikoff v. Commissioner*, 524 F.2d 650 (2d Cir. 1975), cert. denied 425 U.S. 951 (1976), a defendant confronted with a higher sentence than he reasonably thought he was promised may choose to accept that sentence rather than face worse consequences at trial. There is no doubt that Bergman made that same choice with respect to Hynes' performance. Whether or not the word "waiver" is used, the result is the same.

Petitioner argues that a contemporaneous objection would have been useless (brief at 50-57). He is wrong.

First of all, he ignores the most obvious course of action open to him—the very one embraced in *Santobello*: "specific performance" of the recommendation before another judge. If petitioner was concerned about it, he could have simply asked whether Justice Melia recalled anything at all of Hynes' out-of-court statement or the press coverage in general and, if so, sought recusal; instead the defense chose to remind Justice Melia of that publicity as demonstrating that "Bergman has suffered enough." Petitioner's exh. 4 at 62. If there was any doubt that Hynes' compliance could not be perfected by a further clarification, Bergman could have insisted that the recommendation be properly made before a different judge on that ground;

instead the defense thanked Hynes and declared its question academic. *Id.* at 56. Petitioner's tactics were a perfect example of the inexcusable "sand-bagging" condemned by the Supreme Court in *Sykes*: a gamble on a favorable sentence by Justice Melia and an attempt to be resentenced by a habeas court judge when that gamble did not totally pay off. — U.S. at —, 97 S.Ct. at 2508.

Moreover, petitioner's claim that the other obvious course suggested in *Santobello*—withdrawal of the plea—would not effectively return him to his pre-pleading status is also without merit. Bergman's admissions during the plea colloquy, and the admissions made in the grand jury as a part of the plea bargain, were inadmissible if the bargain were negated. *Kercheval v. United States*, 274 U.S. 220 (1927); *People v. Burd*, 18 N.Y.2d 447 (1966). Compare *Hutto v. Ross*, 429 U.S. 28 (1976), in which a spontaneous confession, not required by the plea argument, was held to be voluntary and admissible because it was not the "result of 'any direct or implied promises.'" *Id.* at 30.

Surely it is far too late in the game to suggest that a prosecutor can induce a confession in exchange for a promise, not fulfill that promise, and then use the confession against the defendant at trial. Cf. *Brady v. United States*, 397 U.S. 742, 755 (1970). No one could seriously believe that and no one did. Wilson certainly never thought he could get away with such a thing, no matter who was to blame for the undoing of the plea: "In my judgment, I could not have used those admissions against him" (Wilson: 1026). Lewin never even hinted that he ever believed such a danger of self-incrimination could exist; he simply resented the fact

that the prosecutor had acquired evidence against Blumenthal (Lewin: 412). Nor, one can assume, did Newman, whom the petitioner never called. Indeed, it would have been absurd for them to have spent those months negotiating over every word in a plea agreement which had in it a loophole the size of the Grand Canyon.

The District Court found New York law "unsettled." A. 28. Yet, the Court of Appeals has squarely held that grand jury testimony procured by an improper waiver of immunity, and its fruits, are inadmissible. *People v. Avant*, 33 N.Y.2d 265 (1973). In that case, the impropriety resulted from a law that compelled a public contractor to waive immunity or be disqualified from further contracts. Relying on *Lefkowitz v. Turley*, 414 U.S. 70 (1973), the Court of Appeals held that the evidence had "been obtained at the expense of a constitutional right" and was thus "inadmissible in evidence." 33 N.Y.2d at 271. Assuming, as Bergman now contends, that his grand jury waiver and cooperation had been unconstitutionally obtained through an "unfulfilled promise," in direct violation of *Brady*, *supra*, the result could hardly be different. But, in any event, as the District Court ultimately reasoned, this issue could easily have been tested:

The motion to withdraw the plea could have been joined with a motion to suppress the Grand Jury testimony, with the explicit notation that the two were mutually dependent, so that unless both were granted neither would be sought. The Bergman forces, apparently for strategic reasons, did not pursue this course.

A. 28. If petitioner lost the motion, he would have had at least some colorable excuse for not seeking to withdraw the

plea (but, again, none for not seeking specific performance before another judge). If he won—or, more likely, when Wilson conceded the point—the prosecutor would have lost all benefits from the plea and petitioner would have been in the same position he would have been if he had never entered the bargain. Of course, the prosecutor would still have had Bergman's grand jury testimony, for whatever it was worth against other persons; but that is something he could have independently acquired simply by use of a subpoena. For the same reason, petitioner's newfound worry over the hypothetical use of that testimony in a civil proceeding is irrelevant; he could simply be subpoenaed in such case.

Of course, it is possible that neither Lewin nor Newman explored the logic of these arguments in such detail. Perhaps they merely followed their own sound instincts in their discussions with the Bergmans (Lewin: 441-44) and assured them if the plea were withdrawn as the result of the prosecutor's breach, Bergman's admissions would have been inadmissible in any criminal proceeding. Lewin and Newman may have even been right for the wrong reasons. But respondents are not, as petitioner argues, under the burden of proving that counsel below appreciated every conceivable nuance of law. Even under *Fay v. Noia*, *supra*, one need not be a Harvard professor to make a "knowing and intelligent" choice.

Petitioner also contends that even if he were returned to a pre-pleading status vis-a-vis the law, he was irrevocably tainted by the public knowledge of his plea. Even assuming this "image problem" to be a cognizable concern in the abstract, Bergman's reputation was hardly damaged by

this plea. Indeed, he himself publicly proclaimed that the narrowly-drawn admission of guilt was a vindication compared to the public's general perception of him. Respondents' exh. 4. Blaming 99 per cent of the charges on accountants' mistakes, Bergman triumphantly announced that the "truth" had finally emerged. It is rather disingenuous for him to now complain that this same favorable plea stamped him with an indelible badge of infamy. To the extent that petitioner contends that the publicity given his plea would have precluded a fair trial in New York, he would have had an ample opportunity to *voir dire* prospective jurors or seek a change of venue at a later time.

Petitioner next complains that he had "irretrievably and prejudicially" satisfied his civil liabilities by repaying the state the money he had wrongfully obtained through the Medicaid program. Even assuming that one can be "prejudiced" by returning money which does not belong to him (*cf. Palermo, supra*), petitioner's complaint concerning Hynes' press statement could certainly have been voiced months before he signed a confession of judgment on the morning of sentence. Even after sentencing, petitioner's argument that his signature had been fraudulently procured could have been used to challenge the "irretrievable" civil judgment.

Petitioner's final effort to avoid the effect of his knowing and intelligent waiver can only be described as bizarre. Petitioner argues that even if this Court finds that he deliberately and strategically chose not to pursue either of the two traditional *Santobello* remedies—specific performance or withdrawal of the plea—the Court should, for that very reason, permit him to invoke an even greater remedy:

complete avoidance of a sentence which reflected the best and most informed judgment of Justice Melia, supported by a probation report and affirmed by the Appellate Division. *Contra, United States ex rel. Selikoff v. Commissioner, supra*. To say that petitioner "never waived" that remedy is like saying he never waived the Congressional Medal of Honor. It presupposes that the right was ever his to waive.

Petitioner cites a number of cases in which the courts have gone beyond the remedies contemplated by any of the nine justices in *Santobello*. For example, in *Palermo v. Warden, supra*, this Court set the petitioner free upon a finding by the District Court that Palermo had already been incarcerated for the entire prison sentence and parole term and that if the promise to effect parole had been kept he would have been released before then. The majority reasoned that under those circumstances remand merely for the withdrawal of the guilty plea would be "meaningless." 545 F.2d at 296-97. Similarly, in *Correale v. United States*, 479 F.2d 944 (1st Cir. 1973), the prosecutor violated his promise to recommend a sentence which would have made the petitioner eligible for parole 14 months before the case reached the Circuit Court. The Court ordered the defendant freed on the ground that such a recommendation could not be retroactively followed and would, therefore, be a "hollow" remedy. 479 F.2d at 950. Whatever the merits of the unusual relief granted in those cases* such a remedy is

* *United States v. Carter*, 454 F.2d 426 (4th Cir. 1972), cert. denied, 417 U.S. 933 (1974), and *United States v. Minnesota Mining and Mfg. Co.*, 551 F.2d 1106 (8th Cir. 1977), provide no support for an unorthodox remedy. In both of those cases, the Courts granted specific performance of the government's promise not to prosecute, a decision "completely in the province of the government prosecutors." 551 F.2d at 1112. Compare, *Selikoff, supra*, in which this Court recognized sentencing to be, on both traditional and state statutory grounds, the exclusive province of the judge.

clearly unjustified here. In none of those cases did the "hollowness" of the traditional *Santobello* remedies result solely from petitioner's dilatory tactics. As the District Court here observed, the only reason that petitioner cannot completely undo the results of the interrelated plea bargains is that he deliberately chose to accept the benefits of the "brief federal sentence" rather than to pursue the appropriate course "in September of 1976, when [he] had a virtual invitation from Judge Frankel to withdraw the plea." A. 32, 47 at n. 23. To use petitioner's own idiom, he cannot complain of a choice between the "rock and the whirlpool" where he has deliberately thrown himself into those waters.

B. Petitioner's failure to pursue collateral relief precludes the writ on nearly all the grounds pressed.

It is settled that a petitioner must not only bring his claims initially in state court but must also exhaust his remedies there. *Ex parte Royall*, 117 U.S. 241 (1886); *Wainwright v. Sykes*, *supra*.

As the District Court noted, the State Appellate Division "did not have before it a copy of the [Hynes statement concerning the federal sentence] and declined to accept one, confining itself to the transcribed record on appeal." A. 45 at n. 18. The District Court held, however, that the absence of a written opinion "makes it impossible to determine" whether the state judges in fact confined themselves to "what was properly before them on appeal." A. 46 at n. 19. There is nothing in the record or out of the record to cast doubt on the candor of the state appellate judiciary. Absent some compelling reason to infer otherwise,

it must be assumed that the judges decided the case as they ruled they would: *i.e.*, on what was properly before them on appeal.

It is true that they did not "remand or proceedings." *Id.* New York law does not and operate in that fashion. Exhaustion requires the petitioner to employ "any available procedure." 28 U.S.C. §2254(c). Under state law, an allegation that "improper and prejudicial conduct not appearing in the record occurred" must be raised and proven in a collateral motion to vacate judgment. NYCPL §440.10, subd. (1)(f).

In article 440 of the Criminal Procedure Law, New York has set up a comprehensive scheme of post-conviction remedies. That path was open to petitioner. Had he tried that route and failed, federal habeas corpus would still be available.

* * *

This is not a formal hurdle placed in the way of meritorious claims, but an essential element of federalism in the administration of federal justice. The State courts must be afforded an opportunity to set their own constitutional house in order before the power of the federal courts is invoked.

Fielding v. LeFevre, 548 F.2d 1102, 1106, 1107 (2d Cir. 1977).^{*} That opportunity was not afforded by an appeal which improperly raised, and distorted, facts outside the record.

^{*} The contention that the prosecution was estopped from participating in the post-indictment proceedings could have been raised by a motion to strike the brief.

Moreover, even assuming that the brief was an adequate vehicle by which to bring these facts before the Appellate Division, it is undisputed that they were argued solely in support of a *Santobello* claim. The independent argument, that the statement was actionable prosecutorial misconduct, was never alluded to in any state court. This did not constitute an adequate presentation of the issues because, as the Supreme Court has held, the "substance of a federal habeas corpus claim," and not merely "the facts underlying it," "must first be presented to the state courts." *Picard v. Connor*, 404 U.S. 270, 277-78 (1971). Only then "does it make sense to speak of the exhaustion of state remedies." *Id.* at 276. Thus the same authority which led the District Court to reject consideration of petitioner's double jeopardy argument requires rejection of his prosecutorial misconduct claim even if it were otherwise viable.

Conclusion

The order appealed from should be affirmed.

Respectfully submitted,

CHARLES J. HYNES

Deputy Attorney General

State of New York

Attorney for Respondents-Appellees

EDWARD J. KURIANSKY

ALAIN M. BOURGEOIS

ARTHUR WEINSTEIN

Special Assistant Attorneys General

Of Counsel



Service of 2 copies of the
within Book is hereby
admitted this 28 day of
October, 1977

Signed Louise P. Friedman
my Deponent

Attorney for petitioner appellant

